

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

KENNETH D. MALONE

Plaintiff,

- against -

NATHAN MOUCLRIE

Defendant.

TRIAL / IAS PART 43
NASSAU COUNTY

Index No.17460/00

Motion Sequence No. 01

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The plaintiff moves for an order granting summary judgment pursuant to CPLR 3212. This Court reviewed the parties' papers. The underlying personal injury action results from the plaintiffs' claims of injuries from a motor vehicle accident where it is alleged the defendant's vehicle struck the rear of the plaintiff's vehicle while it was stopped. In support of the motion the plaintiff submits the examination before trial of the defendant wherein he states he struck the rear of the stopped plaintiff's vehicle.

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or

defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (see, *Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court's role is issue finding rather than issue determination (see, e.g., *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli*, *supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co.*, *supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co.*, *supra*).

A rear end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the offending vehicle and imposes a duty of explanation on that operator (see, *Brant v Senatobia Operation Corp.* __AD2d__[2nd Dept. Feb. 2000]; *Hurley v. Izzo*, 248 A.D. 674). Here, the defendant has failed to submit any evidence to explain the operation of his vehicle and has not meet his burden to a raise triable issue of fact. The affirmation of counsel, not based upon personal knowledge of the facts and without supporting documentation, is insufficient (see, *Kartiganer Assocs. v. Town of New Windsor*, 132 A.D.2d 527). Bare conclusory assertions will not suffice to defeat a motion for summary judgment (see, *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223).

Accordingly, partial summary judgment is granted to the plaintiff against the defendant on the issue of liability. A trial is required on the issue of damages.

A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Trial Assignment Part calendar part of this court for trial. Entry of judgment is stayed pending a determination of damages.

SO ORDERED.

Dated: **October 31, 2001**

ENTER:



J. S. C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**